Supreme Court, U.S.
FILED

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No. 03- ____

In the Supreme Court of the United States

SHANNON CASEY,

Petitioner,

v.

ALBERTSON'S, INC. a Delaware corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

PATRICIA J. BARRY, ESQ.
Counsel of Record

634 S. SPRING ST.
SUITE 823
LOS ANGELES, CA 90014

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

QUESTIONS PRESENTED

1. Whether the first attorney of Petitioner Shannon Casey ("Casey") committed such gross malpractice, including not serving denials to Requests for Admissions of Defendant Albertson's Inc., a Delaware Corporation ("Albertson's") when Casey had provided the denials and detailed explanations for them to the attorney before their due date, that the District and Court of Appeal should not have used the admissions against Casey when she sought to vacate the order of summary judgment based on excusable neglect and fraud, especially in view of the attempt of Casey's second attorney to vacate the default admissions, first by way of an ex parte application, and then by noticed motion, and the Magistrate denied the exparte application ruling that there was no emergency, and the District Court ordered her to take the motion off calendar because it was filed beyond the date for filing such motions.

2. Whether the Court of Appeal committed factual error and abused its discretion in finding that Albertson's had not engaged in fraud when it submitted declarations in support of its Motion for Summary Judgment claiming that another employee had more seniority than Casey based on review of the employee's records, never submitted those records in support of the MSJ, or at the time of the Motion to Vacate, or in the Court of Appeal, although this was the only defense Albertson's offered as the reason for the transfer Casey suffered which Casey alleged was due to pregnancy and marital status discrimination, and

sexual harassment on the part of the manager of the store where Casey was employed at the time of the transfer, and Casey located the employee a year later who provided a declaration which stated that everything that Albertson's claimed about her job title and work history was false, and that she did not have more seniority than Casey.

PARTIES TO THE PROCEEDING

The only two parties to the Judgment for which review is sought are Casey and Albertson's. Albertson's is incorporated in Delaware, has its headquarters in Boise, Idaho, and has many grocery stores throughout California.

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The decision of the Court of Appeals affirming the denial of Casey's Motion to Vacate is found at **Appendix A at 1a.** It is published at 362 F.3d 1254. The decision of the District Court denying Casey's Motion to Vacate is found at **Appendix B at 13a**. The minute order of the District Court granting summary judgment is found at **Appendix C at 34a.**

STATEMENT OF JURISDICTION

The published decision of the Court of Appeals was filed on April 5. This Petition is filed within ninety days (excluding Sunday and holiday). Jurisdiction is based on 28 U.S.C. Sec.1254(1). Original jurisdiction was based on diversity, 28 U.S.C. Sec.1332.

RULE INVOLVED

The rule involved in this case is Rule 60(b), Federal Rules of Civil Procedure, which states in part:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;....

> or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken....

Casey brought the action pursuant to California's Fair Employment and Housing Act, Govt. C. Secs. 12940 (marital status discrimination and sexual harassment) and 12941 (pregnancy discrimination). However, neither Court considered the statutes, except in passing, when ruling on the Motion to Vacate. For that reason, the statutes are not attached.

STATEMENT OF THE CASE

I. CASEY'S ALLEGATIONS AND PROCEDURAL HISTORY OF THE CASE.

1. Casey's Allegations.

This is a lawsuit brought under California's Fair Employment and Housing Act ("FEHA"), Govt. C. Sec. 12940, et seq., for sexual harassment, and pregnancy and marital status discrimination. Casey alleged that Albertson's, a large grocery store chain operating in California and incorporated in Delaware, hired her in December 1997 to work as a Food Clerk at a new store which opened in Los Angeles ("Store 6187"). Pete King ("King"), the director of Store 6187 sexually harassed her. Casey rebuffed his sexual advances. King often made reference to Casey's marital status, telling her she should leave her husband and get a divorce.

While on her days off, Casey became ill and took medical leave in June 1998. While on medical leave, her doctor informed her she was pregnant, and on July 14, 1998, while still on leave, she applied for pregnancy leave which was granted. Casey's friend, Roxanne Harrigan, generally presented Casey's medical documentation to King while Casey was on leave. He would often say to Ms. Harrigan that he did not understand why Casey had not left her husband and why she had gotten pregnant. He was clearly displeased with both facts. When Casey was ready to return to work, her immediate supervisor would not give her a work shift. Casey went into the store to speak with King, and for the first time Casey learned she may have been laid off.

King allowed her to work a few days in his store, Store 6187, and then he issued her an ultimatum of either accepting a transfer to Ontario 53 miles away from her home, or be laid off. Casey reluctantly accepted the transfer and Albertson's laid her off a year later in October 1999. She became employed by Lucky's, only, as "luck" would have it, her employer later became, once more, Albertson's as of November 1, 1999. Casey went out on disability leave. She remains on disability leave at this time.

2. Court Proceeding and Mills' Gross Malpractice.

Casey contends that the transfer miles away from her home – itself illegal according to the collective bargaining agreement ("CBA") because she displaced an employee outside her geographic area – was in response to Casey rebuffing King's sexual advances and King learning that Casey had not divorced her husband as King wanted her to do and that she had become pregnant.

Casey's first attorney Maury Mills ("Mills") grossly malpracticed her. In the eleven months he was on the case, Mills conducted no discovery on behalf of Casey, failed to respond to Interrogatories, Request for Production of Documents, and Request for Admissions, defended one day of Casey's deposition, and opposed a Motion for Summary Judgment ("MSJ") based on a CBA preemption argument which the Court denied without a hearing. **The very worst omission of Mills was not to serve Casey's denials to Albertson's Requests for Admissions, placing his client in default, although Casey had provided Mills with the denials and detailed reasons for the denials before the due date of her responses. He never sought an extension to respond to them even when he filed his Motion to withdraw.**

Mills' failure to serve Casey's denials and reasons for the denials was to haunt Casey throughout this proceeding, in both the District Court and in the Court of Appeal.

The second attorney, Margery Melvin, who entered her appearance on June 18, 2001, tried to catch up in two months' time what Casey's attorney had not done in a years' time. Ms. Melvin was also inexperienced and became intimidated at the hearing on the MSJ. Patricia J. Barry, the third attorney and this writer, entered her appearance as Cocounsel on August 8 nineteen days before the hearing on the MSJ. She could not attend the hearing on the MSJ because she was in a jury trial and was unaware until after the MSJ had been granted that few if any of the facts on which Albertson's relied were challenged by Ms. Melvin.

Ms. Barry and Casey did start working on the Motion to Vacate Judgment immediately but because of Ms. Barry's desire to submit a proposed Statement of Genuine Issues, she

ended up against the year's deadline for a Rule 60(b) motion. The delay was serendipitous, although neither the District Court nor the Court of Appeal agreed.

Casey did not have the money to hire an investigator to locate Pepper Smith ("Smith"), who was the key witness, because Albertson's claimed that Smith had seniority over Casey and that was why she was laid off, not because of retaliation for rebuffing King's sexual advances, or because of King's pregnancy and marital status discrimination.

Casey and friends from work tried to locate Smith before the MSJ was granted but with no luck. Ms. Barry learned about Accurint, an online investigation service, just weeks before the year ran out to file a Motion to Vacate, from a friend and attorney, Barbara Hammers, which for a very small amount of money, will do searches to locate witnesses and assets.

Using the service, Ms. Barry located Ms. Smith, and she was willing to provide a declaration which exposed Albertson's articulated defense to the one adverse action (the transfer) as fraudulent.

Even when Casey alleged fraud in Motion to Vacate Judgment ("MVJ") , produced Smith's declaration, and had already showed how even without the Smith Declaration the articulated defense was very suspicious, Albertson's still did *not* produce the Smith employment records, relying instead on the procedural quagmire Casey's lawsuit had become, because her first attorney failed to act, her second attorney acted but had insufficient time to complete her tasks and was inexperienced, and her third attorney could not act because she entered her appearance very late and was involved in a jury trial the day of the MSJ hearing. The state court judge

would not excuse Ms. Barry from the trial and the District Court would not reschedule the MSJ hearing.

The Court adopted all of Albertson's facts in granting summary judgment. The Court used the default admissions against Casey. All of the facts Albertson's used for claiming that Smith was senior to Casey were based only on opinions of Union reps. and a company seniority list. **Albertson's did not produce Smith's employment records on which the opinions were based. To this day, Albertson's has refused to produce the records.**

Smith's employment records are the only valid documents on which any individual, whether company or union, could base an opinion that Smith had more seniority than Casey. The Court noted in the minutes granting summary judgment that "...Plaintiff believed that Pepper Smith, another food clerk [not entirely correct, for as Smith's declaration indicates, she was hired as a Booth Clerk and later promoted to Food Clerk,], was less senior than she..." **Appendix C, 36a,** Fact No. 25. Casey's belief ended up being entirely correct.

3. Chronology of District Court Proceeding:

June 27, 2000: Maury Mills, Plaintiff Casey's first attorney, filed the complaint.

August 16: Albertson's filed its Answer.

November 13: Mandatory Status Conference held with trial and other dates set including discovery cutoff which is April 2, 2001.

December 11: Albertson's filed its first MSJ.

December 27: Mills filed Opposition to MSJ.

January 10, 2001: Court vacates hearing date for MSJ and denies MSJ.

March 7: Stipulated order entered extending discovery-cutoff to April 30 and other dates.

April 20: Ex Parte App'n of Albertson's filed to continue P/T and Trial.

April 25: Stipulation and Order signed to continue all dates, including discovery cutoff to May 28.

April 30: Mills filed a Motion to Withdraw.

May 8: Court entered order allowing Mr. Mills to advance his motion to withdraw so that it would be heard on May 14.

May 14: Order entered permitting Mills to withdraw. The Court also extended dates including the discovery cutoff date, extending it to June 25.

June 18: Court approved substitution of Margery Melvin as Casey's attorney.

June 21: Melvin filed Ex Parte App'n to extend discovery cutoff date to August 9.

June 22: Court entered order revising schedule for trial, including extending discovery cutoff to August 9.

June 25: Albertson's filed its second MSJ to be heard on July 16.

June 29: Casey filed Ex Parte App'n for Relief from Admissions.

June 29: Magistrate Zarefsky denied Ex Parte App'n.

July 2: Opposition to MSJ filed by Plaintiff with request to continue Hearing on MSJ.

July 3: Court on its own motion continued MSJ to August 27.

August 1 and 2: Deposition scheduled for Pete King but Mr. King did not appear.

Further, Ms. Melvin set deposition of person with knowledge of the facts of the so-called "layoff" in the case, of Michael Darby, of Mr. Cude, on whom Albertson's relied to obtain summary judgment); of Suzy Yonemoto, Casey's former immediate supervisor at Store 687; and of James Banks, Manager at store in Ontario. None of them took place.

Also, during this time, Ms. Melvin or her associate appeared at the depositions of Luvenia Carr, a union rep who handled Casey's grievances, and of Connie Leyva, another union rep. Ms. Melvin also appeared at the eight-hour deposition of Casey which was the second day of Casey's deposition, the first day lasting from 10:40 AM to 4 PM (hour or so lunch break).

August 8: Patricia Barry associated in as CoCounsel for Plaintiff.

August 9: Deering Deposition taken by Barry, Plaintiff's attorney. He is Director of Field Reps of Local 770, United

Food and Commercial Workers, AFL-CIO ("Local 770") and a key adverse witness.

August 20: Plaintiff's Ex Parte Application to Extend Discovery Cutoff Date and to continue Hearing on MSJ.. **Barry set out the extensive malpractice of Mills.**

August 22: Court denied Ex Parte. The Court ordered Plaintiff to take Motion for Relief from Admissions off calendar because beyond cutoff date but did state that the depositions of King, Cude, and Darby could go forward. Plaintiff does withdraw her motion. **Appendix D at 45a.**

August 27: Hearing on MSJ at which time Court granted motion. Ms. Barry in trial and could not be present.

At the time the Court granted summary judgment, the Court was aware that in the eleven months Mr. Mills had represented Casey, he had conducted no discovery, and other than to defend Casey the first day of her deposition and to oppose the first MSJ (based on CBA preemption argument), he performed no other legal services. The Court also knew that Mr. Mills had malpracticed Casey by not answering interrogatories, by not responding to Request for Production of Documents, and most of all, by not providing denials to the Requests for Admissions.

In her Motion for Relief from Default Admissions, Casey showed she had provided written, detailed denials to Mr. Mills prior to the date due for the responses, but he let Casey be defaulted without taking any steps to protect her rights before withdrawing.

Ms. Melvin entered her appearance on June 18, 2001 and sought only a short extension of discovery cutoff to August 9,

with the second MSJ set for hearing on July 16. When Ms. Melvin attempted to vacate the default on the Admissions, Magistrate Zarefsky denied the ex parte, ruling there was no emergency. When Ms. Melvin refiled the ex parte as a Motion, the District Court admonished her to take the motion off calendar because it would be heard beyond the cutoff date for discovery. The motion was withdrawn. The Court then used the default admissions as a basis to grant the summary judgment on gender, pregnancy, and marital status discrimination claims on August 27, 2001, and reaffirmed that decision in order denying Motion to Vacate. **Appendix B at 16a, 29a; Appendix C at 37a.**

Casey filed her Motion to Vacate Judgment a year after the minutes granting summary judgment had been entered.

II. THE ORDERS OF THE DISTRICT COURT.

1. The S.J. Minutes.

The Court relied on the opinions of Craig Cude, an Albertson's employee, Luvenia Carr, a Union Rep. at the store where Casey originally worked, and Local 770 claiming that Smith had more seniority than Casey. They relied on Smith's employment records but they were conspicuously absent although referred to throughout Albertson's submission. The Court was aware that Mills refused to provide Casey's denials and reasons for the denials to Albertson's although Casey had provided both to Mills before their due date, as well as his failure to conduct, or respond to, discovery. The Court also agreed with Albertson's that Casey had not exhausted Albertson's sexual harassment procedure before proceeding into court, and that there was insufficient evidence of sexual harassment and discrimination. **Appendix C, *passim*.**

2. The Order Denying Motion to Vacate.

The Court denied Motion to Vacate Judgment. First, the Court found that Plaintiff offered "...a very weak reason to explain her delay in filing this motion." **Appendix B at 19a**. The Court noted that Ms. Barry wanted to file a proposed Statement of Genuine Issues and that the SGI attached as an exhibit to the motion "...remains substantially incomplete and haphazard." ***Id.***

The Court described Casey's and two other coworkers' efforts to locate Smith "...as sporadic at best", and Ms. Barry's explanation that Casey could not afford an investigator to locate Smith, as a "...financial difficulty [which] is insufficient to justify Plaintiff's lengthy delay. [Citation.]" ***Id.*** The Court ruled that Casey "...could have and should have obtained Ms. Smith's declaration much earlier – either before entry of judgment or soon thereafter." ***Id.*** The Court did not impose the symmetrical obligation on Albertson's of producing Smith's records. Nor was the Court concerned that Albertson's defense of Casey's transfer were "opinions" claiming to rely on Smith's records but without providing the records themselves. The Court also noted that the Leyva [a union rep.]deposition showed that Leyva concluded after speaking with an Albertson's human resources employee that Casey was improperly transferred. [Citation to evidence.] ***Id.*** **at 20a.**

The Court found that the first and fourth *Pioneer [Investment Services v. Brunswick Asso. Limited partnership, et al.*, 570 U.S. 380 (1993)] factors "...do not weigh against Plaintiff", those being *prejudice to the defendant and *Casey's good faith. *Id.*

The Court also ruled that Casey was aware of the "facts and law supporting her excusable neglect argument at the time of entry of judgment." ***Id.*** The Court found that "the delay in this case is extreme." ***Id.*** **at 22a**. The Court also found that Casey offered only "...very weak reasons to excuse the original neglect", those reasons being that Ms. Melvin and Ms. Barry did the best they could and that Ms. Melvin was overwhelmed. The Court noted that it "...repeatedly continued discovery and trial dates in this case." [from April 9 to April 30 to May 28 to June 25 to August 9, meaning that Ms. Melvin had 52 days from date she entered her appearance on June 18 to complete her discovery by August 9 while defending against Albertson's discovery.] ***Id.***

The Court noted that Casey did not offer Ms. Melvin's declaration, and it found that Ms. Barry's declaration did not explain why she did not discover that the SGI "was substantially incomplete" before hearing on MSJ. **Id. at 23a.**

The Court rejected all of Casey's evidence based on the fact that the evidence could have been produced before or at the time of the MSJ hearing and there was no excuse for not doing so. ***Id.*** **at 28a.**

The Court also ruled that Casey had not established fraud on the part of Albertson's by clear and convincing evidence. ***Id.*** **at.** The Court also noted that its order granting summary judgment did not rely solely on the articulated reason provided by Albertson's for Casey's transfer – that she was the least senior employee. The Court also found no evidence of sex, marital status, and pregnancy discrimination "... in light of Plaintiff's [default] admissions." ***Id.*** **at 29a**. Throughout its decision, the Court was silent about Mr. Mills' gross malpractice causing Casey's default with respect to the

admissions and his general abandonment of the case while he was attorney of record.

The Court found that what Albertson's officials said about the date of Casey's transfer was not enough to prove fraud by clear and convincing evidence. **Id. at 30a** Casey failed to prove union officials' fraud by clear and convincing evidence "...because Ms. Smith's payroll or employment records, which Ms. Carr claimed to have reviewed, simply are not before the Court. Defendant apparently did not produce them as part of its initial disclosures, and Plaintiff never served any document production requests in this case." ***Id.* at 31a.**

Since Casey was aware of the contradiction between what Ms. Leyva and Ms. Carr testified to, Casey "...failed to diligently address this issue." The Court concluded that "The fraud Plaintiff now alleges did not prevent her from fully and fairly presenting her case.' ***Id* at 32a**.

The Court acknowledged that discovery misconduct is a basis for relief under Rule 60(b)(3). Casey did not argue that Albertson's was required to produce Smith's employment records under Rule 26(a), and Casey failed to serve Albertson's with a request for documents. The Court concluded that Casey had not proved fraud by clear and convincing evidence and in any event, Casey could have discovered the alleged fraud with due diligence. ***Id.***

After the Court denied the MTV, Casey filed a declaration and a copy of her Request for Production of Documents showing that Ms. Melvin had requested Pepper Smith's records and indicating that when Ms. Melvin asked Kim Talley, Albertson's Attorney, after the conclusion of a deposition whether she would produce the documents, Ms. Talley, replied that she would not.

III. THE COURT OF APPEALS DECISION.

The Court spent most of its opinion on the first issue that Casey raised in her opening brief, and that is, whether there was a judgment because the District Court had filed minutes granting S.J. indicating that an order was to follow, which never did nor was a separate document filed granting judgment to the defendant. **Appendix A at 5a-9a**. Casey does not raise this issue

The Court of Appeal stated that:

> Casey advances two principal arguments for setting aside the judgment pursuant to Rule 60(b). First, she claims two forms of excusable neglect: lack of funds to locate Pepper Smith and lack of knowledge of an inexpensive on-line investigation service that she eventually used to find Smith, and various foul-ups by her various lawyers. Second, she argues that Albertson's committed fraud by failing to turn over Smith's employment history in response to discovery requests and by transferring Casey instead of Smith, who had less seniority. None of these contentions has merit. **Appendix A at 10a**

The Court found that Casey and her attorney did not provide sufficient reason why there was only one search service to locate Smith and why Ms. Barry was unable to discover the search service until nearly a year after judgment had been entered. ***Id.***

The Court found that the district court's ruling that Casey's failure to look for and find a key witness until *after* the lawsuit was over was not excusable neglect under Rule 60(b)(1) was not an abuse of discretion. ***Id.***

The Court, like the District Court, ruled that Casey did not prove that finding this witness would have changed the outcome of the summary judgment hearing **given the requests for admissions she failed to answer.** ***Id.***

Casey's second excusable neglect argument is that her first attorney committed malpractice; that her second attorney was inexperienced; and that her second and third attorneys did the best they could under the circumstances. The Court found this argument insufficient for relief because parties are bound by their attorneys' actions. The Court stated:

> This is especially the case where a party has waited a year to complain about the failings of her lawyers. The time for Casey to have complained about her lawyers was when her third attorney came on, weeks prior to the summary judgment ruling, and not a year later in a motion for relief from judgment. ***Id.*** **at 11a.**

The Court rejected Casey's claims of fraud characterizing the claim as based on "Albertson's failure to respond to a request for production of Smith's employment records."

The Court described Albertson's fraud "..as a run-of-the-mill discovery problem for which the rules provide remedies, had they been sought **(as Casey herself learned the hard way when she failed to respond to Albertson's requests for admissions).**" ***Id.*** **at 12a**, emphasis added.

The Court concluded that:

> Albertson's discovery recalcitrance does not constitute fraud. Moreover, Casey failed to file a motion to compel production of Smith's employment records. Plaintiff's only other argument that Albertson's

committed fraud is that it was fraudulent for Albertson's to have transferred Casey instead of the less-senior Smith. However, this is a clear attempt to relitigate the issue central to the merits of this case and the district court's summary judgment motion. *Id.*

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER GROSS NEGLIGENCE AND/OR ABANDONMENT OF A CLIENT CONSTITUTES "EXCEPTIONAL CIRCUMSTANCES" JUSTIFYING RELIEF FROM JUDGMENT UNDER RULE 60(b), AND THIS CASE PROVIDES A "BRIGHT LINE" BETWEEN EXCUSABLE NEGLECT GENERALLY IMPUTED TO THE CLIENT AND INEXCUSABLE GROSS MALPRACTICE NO CLIENT SHOULD HAVE IMPUTED TO HIM/HER.

Casey sought to vacate the judgment based on excusable neglect, lumping Mr. Mills' gross malpractice with the actions and omissions of Ms. Melvin and this writer in this category. Nonetheless, throughout her Opening Brief ("OB"), Casey requested that the Court of Appeal not impute what she described as the gross malpractice of Mr. Mills to her. She repeatedly discussed that malpractice at pp. 10, 11, 18, 26, 31, 53, and 59 of her OB.

In her OB, Casey described the gross malpractice of Mr. Mills which included failure to conduct **any** discovery, including a request for Smith's employment records, and failure to respond to Albertson's discovery, including interrogatories, requests for documents, and of course,

Request for Admissions. In the eleven months he was attorney of record, Mr. Mills filed a complaint, defended a MSJ based on CBA preemption argument, and defended Casey at her deposition for one day.

Contrary to the Court of Appeal's statement that Ms. Barry and Casey waited an entire year before bringing to the Court's attention the malpractice of Mr. Mills, Casey had filed with the Court her statement of concerns about Mr. Mills when he wanted to withdraw, in May 2001, **Appendix G at 52a;** Ms. Barry had filed an ex parte application seeking to extend the cutoff date of discovery and the trial within days of entering her appearance as Cocounsel in which she outlined Mr. Mills' malpractice; Ms. Melvin filed an ex parte application and then a Motion for Relief from Default Admissions attaching to the application and the motion Casey's denials and reasons for the denials and showing that Casey had provided Mr. Mills the denials and the reasons before their due date. The Magistrate denied the ex parte stating that there was no emergency, **Appendix E at 47a**, and the District Court ordered that the motion be taken off calendar because filed after the cutoff date for discovery. **Appendix B at 16a**

The Court of Appeal, like the District Court, failed to address Mr. Mills' gross malpractice under the holding of the Ninth Circuit in *Community Dental Services v. Tani*, 282.F.3d 1164 (9th Cir. 2002), and instead both the District court and the Court of Appeal used the default admissions against Casey to support their rulings. In *Tani*, the Ninth Circuit stated that:

> This circuit, however, has not yet addressed the question whether a client is responsible for his counsel's gross negligence, or, to put the question

> differently, whether gross negligence may constitute "extraordinary circumstances" warranting relief under Rule 60(b)(6). *Id.* at 1168.

The Court held:

> We join the Third, Sixth, and Federal Circuits in holding that where the client has demonstrated gross negligence on the part of his counsel, a default judgment against the client may be set aside pursuant to Rule 60(b)(6).[fn10 omitted] ...Where, as here, an attorney engages in grossly negligent conduct resulting in such a judgment, the client merits relief under Rule 60(b)(6), and may not be held accountable for his attorney's misconduct. *Id.* at 1169.

As indicated *supra*, the Court of Appeal simply lumped Mr.Mills' gross malpractice into what it characterized as "various foul-ups by her various lawyers". Both Courts placed Ms. Melvin and this writer in an impossible situation, requiring that Ms. Melvin make up in 52 days to complete discovery what Mr. Mills had not done in eleven months, with the Ninth Circuit stating that one of Casey's attorney did not show up for the MSJ hearing although Ms. Barry had explained in a declaration that she was unable to attend the hearing on the summary judgment motion to make oral argument because she was in trial in Los Angeles Superior Court. The trial judge would not excuse her and the District Court would not continue the MSJ hearing.

When the District Court ruled that Casey had not requested Smith's records, she produced the request for them that Ms. Melvin had served. Casey also provided her declaration stating that Ms. Talley told Ms. Melvin that she would not produce them at a deposition.

The Court of Appeal then stated that Casey should have filed a Motion to Compel, an impossible feat given the 52 days Ms. Melvin had to complete discovery after coming on the case. Albertson's had 33 days to respond to the request (30 + 3 days for service by mail). Under the local rules of the Central District, Ms. Melvin had to confer with Ms. Talley before filing the Motion to Compel. Ms. Talley had ten days before even responding to the request to meet and confer. If the meet and confer did not resolve the issue, Ms. Melvin had to provide Statement of Facts and Law to Ms. Talley who had ten days to provide her portion. Only after all of this took place, could Ms. Melvin had filed the motion.

An innocent client like Casey should not have to pay for the sins of gross neglect, in fact, abandonment of the case, by her attorney. Both of her subsequent attorneys were dealing not only with the facts of Casey's employment but with Mr. Mills' failure to conduct or respond to any discovery.

As the Ninth Circuit noted in *Tani, supra,* there is a conflict among the circuits on whether subsection 6 of Rule 60(b) permits relief in the instance of gross malpractice on the part of the attorney of the defaulting client:

> The circuits that have distinguished negligence from gross negligence in the present context have granted relief to the client where the default judgment was a result of his counsel's displaying "neglect so gross that it is inexcusable." *Boughner v. Sec'y of Health, Educ. & Welfare*, 572 F.2d 976, 978 (3d Cir. 1978); see also *Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805, 806 (3d Cir. 1986) (reversing denial of plaintiff's R. 60(b) motion based on plaintiff's counsel's "blatant disregard for explicit [court] orders"); *Shepard Claims Serv., Inc. v. William Darrah & Assocs.*, 796 F.2d

190, 195 (6th Cir. 1986) ("Although a party who chooses an attorney takes the risk of suffering from the attorney's incompetence, we do not believe that this record exhibits circumstances in which a client should suffer the ultimate sanction of losing his case without any consideration of the merits because of his attorney's neglect and inattention."); *L.P. Steuart, Inc. v. Matthews,* 329 F.2d 234 , 235 (D.C. Cir. 1964) (stating that R. 60(b)(6) "is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a diligent client's case and mislead the client"); *Primbs v. United States*, 4 Cl. Ct. 366, 370 (1984) (holding that normal attorney-client relationship does not bar Rule 60(b) relief when "the evidence is clear that the attorney and his client were not acting as one").[fn 9 omitted]....

The First and Fourth Circuits have also approved of this principle, albeit in dicta. See *In re Virginia Info. Sys. Corp.*, 932 F.2d 338, 342 (4th Cir. 1991) ("[A]ttorney malfeasance which actively misleads a client or is comparably culpable might successfully ground a Rule 60(b) motion."), overruled on other grounds by *Barnhill v. Johnson*, 503 U.S. 393 (1992); *Greenspun v. Bogan*, 492 F.2d 375, 382 (1st Cir. 1974) ("Rule 60(b) of the F.R.Civ.P. is a remedial rule which normally receives a liberal construction from courts concerned that cases not be decided in default against parties who are inadvertently absent. But the liberal construction is usually reserved for instances where error is due to failure of attorneys or other agents to act on behalf of their clients. . . .") (internal citations omitted). The position of the Second Circuit is unclear. Although the court has stated that it is generally reluctant to allow relief under Rule

> 60(b)(6) for a counsel's gross negligence, see *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir. 1986), it has occasionally granted relief on this ground. See, e.g., *United States v. Cirami*, 563 F.2d 26, 34-35 (2d Cir. 1977); *Vindigni v. Meyer*, 441 F.2d 376, 377 (2d Cir. 1971). *Id.* At 1168-1169

The Ninth Circuit then cited the cases from the circuits holding contra, namely, the Seventh and Eighth Circuits:

> But see *Dickerson v. Bd. of Educ. of Ford Heights*, 32 F.3d 1114, 1118 (7th Cir. 1994) (stating that "counsel's negligence, whether gross or otherwise, is never a ground for Rule 60(b) relief"); *Heim v. Commissioner*, 872 F.2d 245, 248 (8th Cir. 1989) (stating in context of tax case that even if regular R. 60(b) standards applied that "any errors committed by [counsel], even accepting the designation of gross negligence, do not constitute an adequate showing of 'exceptional circumstances'" and distinguishing cases which did grant relief for attorney negligence as cases in which client was left virtually unrepresented).

This case would be an appropriate one to resolve the conflict in the circuits on whether gross negligence or malpractice of an attorney constitutes exceptional circumstances under Rule 60(b)(6), so that a defaulting party can obtain relief from a judgment or order which was obtained as a result of his/her attorney's gross neglect or malpractice.

II. IN RULING THAT CASEY HAD NOT PROVEN FRAUD BY CLEAR AND CONVINCING EVIDENCE, THE COURT OF APPEAL CONFLATED THE FAILURE OF ALBERTSON'S TO PRODUCE SMITH'S EMPLOYMENT RECORDS WITH STATEMENTS UNDER OATH CLAIMING THAT SMITH HAD SENIORITY OVER CASEY.

The Court of Appeal stated that Casey based her fraud allegation on the failure of Albertson's to turn over Smith's employment records. **Appendix A at 9a**. That is not correct. The gravamen of Casey's claim was that she suffered an adverse transfer from Store 6187 because she rebuffed the sexual advances of King and because King was unhappy that she had not followed his advice to leave her husband, instead staying married and becoming pregnant.

We produced direct evidence from numerous witnesses supporting the sexual harassment and the pregnancy and marital status discrimination based on observations of King's behavior toward Casey and comments he made about her pregnancy and marriage to Roxanne Harrigan while Casey was on leave.

The only way that Albertson's could win was to articulate a defense justifying the transfer for a nondiscriminatory reason. To accomplish this, Albertson's used the declaration of Mr. Cude an Albertson's employee and the deposition testimony of Luvenia Carr, a Union Rep at Store 6187, both of whom claimed that there was a layoff, Smith had greater seniority than Casey, and therefore, Casey had to be transferred.

Casey always claimed that Smith had less seniority than she, which the Court acknowledged in the SJ minutes. **Appendix at C at 36a** , but she had only circumstantial evidence to support her claim, because Cude and Carr had joined forces with Mr. Deering, a union official whose deposition Casey took, and all swore that Smith was senior to Casey or that Casey was laid off pursuant to a legitimate layoff.

The Court acknowledged in its MVJ Order, **Appendix B at 30a** at lines 12-18, that Carr claimed to have reviewed Smith's payroll records and Defendant's seniority lists, and based on those records, concluded that Smith was senior to Casey. Ms. Talley, Albertson's attorney, never provided those records to the Court when she filed her MSJ, which the Court also acknowledged in its MVJ Order at **Appendix B at 31a**, lines 11-14, even when Casey established fraud through Smith's declaration showing Smith could not be senior to Casey because she was promoted to Food Clerk after she was hired and she had never worked in the grocery industry.

Craig Cude, whose declaration was referred to by the Court in its MV Order at **Appendix B at 29a**, lines 1-9, claimed he had provided Luvenia Carr with seniority lists and payroll and wage documents, but, as at Carr's deposition, *did not attach payroll and wage documents* to his declaration, only two seniority lists one of which he himself compiled.

Albertson's managed to avoid production of Smith's employment records all the while relying on them but not producing them as part of its Rule 26 disclosure, by referring to them and not producing them at Carr's deposition, and by referring to them in Cude's declaration but not attaching them to that declaration.

In the SJ minutes, the Court adopted the facts on which Albertson's based its defense that Smith was more senior to Casey. The company seniority list, Cude's, Carr's, and Union Local 770's opinions, and Carr's conclusion based on her investigation mean nothing without the employment records of Smith, since they provide the evidentiary foundation for the opinions, conclusion, and the company seniority list. Thus, Albertson's evidence violates Central District L.R.58-7 which requires that facts be "adequately" supported.

Deering, a top union official, made it especially difficult for Casey to pierce the fraudulent defense because besides spending money on his deposition, Deering maintained the company line, despite all kinds of circumstantial evidence to the contrary, including that he would be surprised that Smith would be earning close to five dollars less than Casey if she had more seniority than Casey, testifying he had not looked at Smith's employment records before concluding that Smith had more seniority than Casey, that he was relying on an interview he had at the store with management that Smith came over from a Max Store as a Food Clerk, that it was Lavinia Carr who was the agent to check on it to see if Smith had come over and he believed the answer was yes, from a Max store he means. He stuck to his guns, that in the meetings he had with Harrigan and Casey, he told them that Smith had more seniority than Casey, contradicting what Harrigan claimed he told them, which was that based on Smith's payroll records, she was not a checker, and she was the least senior. In support of the MV, Casey produced Roxanne Harrigan's declaration which stated in part:

> Casey and I met with Mr. Deering, to my recollection, three times. *We examined payroll records, and Mr. Deering agreed with us that from*

> *these payroll records, it was clear that Pepper was not a checker.* Mr. Deering would not allow us to have copies of these records, saying we could only review them in his presence. ...
>
> On one of the occasions Casey and I met with Deering, we went over documents concerning layoffs at Store 687 with Deering. .... Pepper Smith's hire date was after Casey's and mine. Deering requested check stubs from Corporate. ... *These stubs clearly showed that Pepper made less at a certain date.*

Mr. Deering finally admitted there were mistakes made, that Pepper was least senior, and that I should not have been transferred. However, he said he needed to check out more information and would get back to us. In the meantime, he said, that we should give him a list of what remedies we wanted, which we did. Emphasis added.

Surely, a witness who swears to have reviewed records and claims that the records state the very opposite of what those records reflect has committed fraud. When the fraudulent statement is the primary defense to an action, then the fraud permeates the action, depriving the plaintiff of her right to fairly and fully present her case.

Albertson's took full advantage of Mills' malpractice. Mills never asked for Smith's records, and when Ms. Melvin requested them, Ms. Talley told her she would not produce them. At that point, it was way too late to file a Motion to Compel.

CONCLUSION

For the reasons stated in this Petition, Casey requests that the Court accept review of the issues presented.

DATED: July 6, 2004

Respectfully Submitted,

PATRICIA J. BARRY
Counsel of Record
634 S. Spring Street
Suite 823
Los Angeles, CA 90014

Counsel for Petitioner
Shannon Casey

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-57198

[April 5, 2004]

SHANNON CASEY,
Plaintiff-Appellant,

v.

ALBERTSON'S INC., a Delaware corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Central District of California.
D.C. No. CV-00-06950-AHM.
A. Howard Matz, District Judge, Presiding.

JUDGES: Before: Barry G. Silverman, Ronald M. Gould, and Carlos T. Bea, Circuit Judges. Opinion by Judge Silverman

OPINION

SILVERMAN, Circuit Judge:

We hold today that when the parties treat a fully dispositive summary judgment order as if it were a final judgment, the requirement in Federal Rule of Civil Procedure 58 that the judgment "be set forth on a separate document" can be waived. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 382, 98 S. Ct. 1117, 55 L. Ed. 2d 357 (1978).

I. Facts

Appellant Shannon Casey filed this lawsuit against Albertson's, her employer, alleging sexual harassment and discrimination based on marital status in violation of Califoria's Fair Employment and Housing Act. She alleged that Pete King, the manager of the Albertson's where she worked, sexually harassed her and then transferred her to another store when she returned to work following her pregnancy. Casey alleges that her transfer to another store was illegal because there was another employee, Pepper Smith, who was less senior than Casey who should have been transferred instead. She claims that her transfer "was in response to Casey's rebuffing King's sexual advances and King learning that Casey had not divorced her husband as King wanted her to do and that she had become pregnant."

Casey failed to respond to Albertson's requests for admissions. As a result, under Federal Rule of Civil Procedure 36(a), she was deemed to have admitted that, among other things, (1) King did not discriminate against her on the basis of gender; (2) King did not discriminate against her on the basis of her marital status; (3) King did not discriminate against her on the basis of her pregnancy; and (4) King did not make the decision to transfer her. Casey's

attorney also failed to attend a hearing on Albertson's motion for summary judgment.

The district court granted Albertson's summary judgment on all claims on August 28, 2001. Summary judgment was granted in the form of a civil minute order. Although the judge's seven page civil minute order disposed of all of Casey's claims and concluded with "IT IS SO ORDERED," no separate judgment was entered.

On August 28, 2002, exactly one year from the entry of summary judgment, Casey moved for relief from judgment under Federal Rule of Civil Procedure 60(b), arguing that the judgment should be set aside because of excusable neglect, new evidence, and fraud, misrepresentation, or misconduct. The gist of her motion was that by means of an inexpensive Internet investigation service, of which she had only recently become aware, Casey was able to locate Pepper Smith, who could confirm that Smith had less seniority than Casey but was not transferred to another store. The court noted that the one year filing limit for relief from judgment under Rule 60(b)(1), (2), & (3) "is an outer limit," and that "plaintiff delayed filing this motion until the last possible day."[1] The court also ruled that the delay in locating Pepper Smith was unjustified. On November 26, 2002, the court denied Casey's motion, ruling that Casey had not demonstrated excusable neglect, newly discovered evidence, or fraud, misrepresentation, or misconduct, pursuant to Rule 60(b)(1),

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[1] The court also observed that Casey had never submitted a statement of genuine issues along with her Rule 60 motion, despite her having cited the need for time to prepare this document as a reason for the delay in filing the motion.

(2), & (3), respectively. Casey filed her notice of appeal from that ruling on December 19, 2002.

At some point after the district court denied her Rule 60(b) motion and the notice of appeal had been filed, Casey noticed that the district court had failed to enter a final judgment on a document separate from its summary judgment ruling. On July 22, 2003, eight months after the district court denied her Rule 60(b) motion, Casey lodged with the district court a proposed form of judgment. On August 8, 2003, the district court entered a minute order acknowledging that "although summary judgment was granted in favor of Defendant Albertson's, Inc. on August 28, 2001, thereby terminating the case, a final judgment on a separate document was not entered." However, the court held that it no longer had jurisdiction over the case because a notice of appeal had been filed. It continued: "However, if either Plaintiff or Defendant Albertson's Inc. believes that a separate document is necessary . . . and that this court does have jurisdiction to enter a judgment . . ., either party may file a brief . . . to that effect . . . ." After briefing by both sides, the district court ruled that, pursuant to *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 55 L. Ed. 2d 357, 98 S. Ct. 1117 (1978), the litigants had waived strict compliance with the separate judgment requirement by proceeding as if a separate judgment had been entered.

II. Jurisdiction and Standard of Review

We have jurisdiction pursuant to 28 U.S.C. § 1291. Motions for relief from judgment pursuant to Rule 60(b) are addressed to the sound discretion of the district court and will not be reversed absent an abuse of discretion. *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001). A district court abuses its discretion if it does not apply the correct law or if

it rests its decision on a clearly erroneous finding of material fact. *Bateman v. United States Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000).

III. Discussion

Casey spends the bulk of her time on appeal rearguing the merits of the district court's grant of summary judgment. However, her notice of appeal expressly states she is appealing only the denial of her Rule 60(b) motion. Normally, the merits of a case are not before the panel in reviewing a Rule 60(b) motion. *See Wages v. I.R.S.*, 915 F.2d 1230, 1234 (9th Cir. 1990) ("an appeal from a denial of Rule 60(b) relief does not bring up the underlying judgment for review") (internal quotation marks omitted). There are thus two issues before the court: First, does the fact that the district court did not enter a judgment separate from its summary judgment minute order somehow allow the district court or this court to revisit the merits of the summary judgment ruling; and, second, did the district court abuse its discretion in denying Casey's Rule 60(b) motion?

A. The Separate Judgment Rule

Federal Rule of Civil Procedure 58(a)(1) provides that "every judgment . . . must be set forth on a separate document." It further states that "unless the court orders otherwise, the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when . . . the court denies all relief." Fed. R. Civ. P. 58(a)(2)(A)(iii); *but see* Fed. R. App. P. 4(a)(7)(B) ("A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order."). "Only when both" rules Rule 58 and

Rule 79(a) -- which tells the parties how the clerk must enter documents on the civil docket -- "are satisfied is there an 'entry of judgment' " that tells the parties they may appeal. *Radio TV Espanola S.A. v. New World Entertainment, Ltd.*, 183 F.3d 922, 930 (9th Cir. 1999). "The separate document requirement . . . exists so that the parties will know exactly when the judgment has been entered and they must begin preparing post-verdict motions or an appeal." *Carter v. Beverly Hills Sav. & Loan Ass'n*, 884 F.2d 1186, 1194 (9th Cir. 1989) (Kozinski, J., dissenting).

"Although a final judgment requires a 'separate document,' neither the Supreme Court nor this court views satisfaction of Rule 58 as a prerequisite to appeal." *Kirkland v. Legion Ins. Co.*, 343 F.3d 1135, 1140 (9th Cir. 2003) (citation omitted); *see also Lower Elwha Banc of S'Klallams v. Lummi Indian Tribe*, 235 F.3d 443, 448 (9th Cir. 2000). "A ruling is final for purposes of § 1291 if it (1) is a full adjudication of the issues, and (2) clearly evidences the judge's intention that it be the court's final act in the matter." *National Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997) (citation and internal quotation marks omitted).

The Supreme Court's decision in *Bankers Trust*, while not on all fours with this case, leads us to the conclusion that the district court's failure to file a separate judgment does not affect any of the issues in this appeal. In *Bankers Trust*, "the issue posed is whether a decision of a district court can be a 'final decision' for purposes of § 1291 if not set forth on a document separate from the opinion." 435 U.S. at 383. There, the district court failed to enter a judgment as a separate document, but the district court's "opinion and order" contained the language "cmplaint dismissed in its entirety. So ORDERED." *Id.* at 382 & n.1. The Court

concluded that "it could not have been intended that the separate document requirement of Rule 58 be such a categorical imperative that the parties are not free to waive it." *Id.* at 384.

> If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose.
>
> . . . The need for certainty as to the timeliness of the appeal [*i.e.*, the purpose of Rule 58] . . . should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered.
>
> . . . Here, the District Court clearly evidenced its intent that the opinion and order from which an appeal is taken would represent the final decision in the case. A judgment of dismissal was recorded in the clerk's docket. And petitioner did not object to the taking of the appeal in the absence of a separate judgment. Under these circumstances, the parties should be deemed to have waived the separate document requirement of Rule 58, and the Court of Appeals properly assumed appellate jurisdiction under § 1291.

Id. at 385-86, 387-88; *see also Kirkland*, 343 F.3d at 1139-40 (holding that a district court settlement order that effectively ended the litigation on the merits was a final, appealable order despite the absence of entry of a separate judgment, and a party that had attempted to enforce the agreement waived the

right to question this issue); *Pac. Employers Ins. Co. v. Domino's Pizza, Inc.*, 144 F.3d 1270, 1278 (9th Cir. 1998) ("under Rule 58, a district court is not even required to file two separate documents"); *Beaudry Motor Co. v. Abko Props., Inc.*, 780 F.2d 751, 754-55 (9th Cir. 1986) (holding that a civil minute order that is prepared at the direction of the district judge, noted in the docket, file stamped, and ended with the language "IT IS SO ORDERED" "clearly put plaintiff's counsel on notice that an order had been entered against his client" and satisfied Rule 58 despite the lack of entry of a formal, separate document).

Here, Casey unequivocally indicated her belief that the August 28, 2001 summary judgment minute order served as a judgment by filing a Rule 60(b) motion. In *Bankers Trust*, the filing of an appeal and the parties proceeding before an appellate court as if a separate judgment had been entered was indicative of acknowledgment by the parties that a final judgment had been entered. The same is true in this case. Casey filed a Rule 60 motion, indicating an unambiguous belief that a judgment had been entered. Judge Matz's order explicitly granted summary judgment for Albertson's on all the claims and indicated that the matter was concluded. Thus, as *Bankers Trust* can be said to stand for the proposition that a party's actions indicating its belief that a final judgment was entered can be sufficient to waive any Rule 58 objections, Casey exhibited such a belief by filing a Rule 60 motion and subsequently waived any Rule 58 objection to the district court's failure to file a separate judgment.

It is true that there are cases stating that "a mechanical application of Rule 58" is required. *See, e.g., Long v. Coast Resorts, Inc.*, 267 F.3d 918, 922 (9th Cir. 2001); *Radio TV*, 183 F.3d at 930. However, in those cases, Rule 58 is used to salvage the appealability of a case where it may have been

unclear in the district court which document was the final judgment. *See Long*, 267 F.3d at 922 (applying the "mechanical" Rule 58 separate document requirement to salvage the validity of an appeal where it was not clear which district court entry was the final order for appeal purposes); *Radio TV*, 183 F.3d at 929-32; Carter, 884 F.2d at 1189-91; *Paddack v. Morris*, 783 F.2d 844, 846 (9th Cir. 1986). We have found no cases that apply *Rule 58* as Casey would urge, as a sword to reopen a case in which the parties and the judge all have indicated that they treat a district court entry as a final, separate judgment.

In these circumstances, the district court's failure to enter a separate judgment apart from its August 28, 2001 minute order does not create a loophole through which we can reach past Casey's Rule 60(b) motion to get to the merits of the district court's summary judgment ruling. However, the Rule 60(b) motion is properly before us, and we turn to it now.

B. Rule 60(b) Motion

Casey advances two principal arguments for setting aside the judgment pursuant to Rule 60(b). First, she claims two forms of excusable neglect: lack of funds to locate Pepper Smith and lack of knowledge of an inexpensive on-line investigation service that she eventually used to find Smith, and various foul-ups by her various lawyers. Second, she argues that Albertson's committed fraud by failing to turn over Smith's employment history in response to discovery requests and by transferring Casey instead of Smith, who had less seniority. None of these contentions has merit.

1. Excusable Neglect

Rule 60(b)(1) provides that "on motion . . . the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . excusable neglect." Casey's first argument that her Rule 60(b)(1) motion should be granted is that she was justifiably delayed in her efforts to locate Smith and obtain her declaration. This argument is unpersuasive. Casey does not explain why only one search service could locate Smith, nor why she was unable to "discover" this service until nearly a year after the entry of summary judgment. The district court ruled that Casey's failure to look for and find a key witness until *after* the lawsuit was over was not excusable neglect under Rule 60(b)(1). The district court did not abuse its discretion in so ruling. *Cf. United States v. Bransen*, 142 F.2d 232, 235 (9th Cir. 1944). Further, Casey did not prove that finding this witness would have changed the outcome of the summary judgment hearing given the requests for admissions she failed to answer.

Casey's second excusable neglect argument is that her first attorney committed malpractice; that her second attorney was inexperienced; and that her second and third attorneys did the best they could under the circumstances. As a general rule, parties are bound by the actions of their lawyers, and alleged attorney malpractice does not usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1). *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) (parties are "held responsible for the acts and omissions of their chosen counsel"); *Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 666 (9th Cir. 1997) ("attorney error is insufficient grounds for relief under . . . Rule 60(b)(1)").

This is especially the case where a party has waited a year to complain about the failings of her lawyers.

The time for Casey to have complained about her lawyers was when her third attorney came on, weeks prior to the summary judgment ruling, and not a year later in a motion for relief from judgment. The district court did not abuse its discretion in ruling that Casey's attorneys' alleged inexperience and/or malpractice did not constitute excusable neglect under Rule 60(b)(1).

2. Fraud

Rule 60(b)(3) provides that "on motion . . . the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons . . . fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." "To prevail, the moving party must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense." *De Saracho v. Custom Food Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir. 2000). "Federal Rule of Civil Procedure 60(b)(3) requires that fraud . . . not be discover-able by due diligence before or during the proceedings." *Pac. & Arctic Ry. and Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1148 (9th Cir. 1991).

Casey claims that Albertson's failure to respond to a request for production of Smith's employment records constitutes fraud. It is significant to note that this is not a case in which it is alleged that Albertson's possessed Smith's employment records but falsely denied having them, or the like. Casey simply argues that Albertson's failed to respond

to a discovery request made two and a half weeks before the close of discovery. This is a run-of-the-mill discovery problem for which the rules provide remedies, had they been sought (as Casey herself learned the hard way when she failed to respond to Albertson's requests for admissions). Albertson's discovery recalcitrance does not constitute fraud. Moreover, Casey failed to file a motion to compel production of Smith's employment records.

Plaintiff's only other argument that Albertson's committed fraud is that it was fraudulent for Albertson's to have transferred Casey instead of the less-senior Smith. However, this is a clear attempt to relitigate the issue central to the merits of this case and the district court's summary judgment motion. As the merits of a case are not before the court on a Rule 60(b) motion, this claim fails as well.

IV. Conclusion

For the foregoing reasons, the district court's denial of Casey's Rule 60(b) motion is **AFFIRMED**.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 00-6950 AHM (Rzx)

[Filed November 25, 2002]

SHANNON CASEY, Plaintiff,

v.

ALBERTSON'S INC., Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

INTRODUCTION

This matter is before the Court on Plaintiff's motion for relief from judgment under Federal Rule of Civil Procedure 60(b). Plaintiff's motion seeks relief based on excusable neglect, new evidence, and fraud, misrepresentation or

misconduct.[1] Having considered the papers submitted and the file in the case, the Court has determined that this matter is suitable for submission to the Court without oral argument. *See* Local Rule 7-15; Fed. R. Civ. P. 78.

FACTS

Plaintiff was hired to work at Albertson's Store 6187 on December 2, 1997. Plaintiff's Deposition 17:2-7, (Talley Decl., Ex. A, filed in support of Defendant's Motion for Summary Judgment). Plaintiff worked continuously for Defendant until June of 1998, when Plaintiff took pregnancy leave. *Id.* at 223:12-25. When Plaintiff returned from her pregnancy leave in October of 1998, Plaintiff was informed that she had been selected for lay-off and that she could choose instead to transfer to another Albertson's store in Ontario. *Id. at* 174:19-175:5. Plaintiff did transfer to the Ontario store. *Id.* at 29:21-23. In her complaint, Plaintiff alleges that she was sexually harassed at Store 6187 by the store director, Ruven "Pete" King. Plaintiff's Complaint ¶ 13. Plaintiff also alleges that her transfer was the result of sex, marital status or pregnancy discrimination. *Id.* ¶¶ 16-27

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[1] Plaintiff also argues that the Court was mistaken in failing adequately to consider the issue of pregnancy discrimination in its order granting summary judgment. Notice of Motion at 2. The Court disagrees. In its order, the Court found that Plaintiff had failed to create a triable issue as to Defendant's asserted legitimate reason for her transfer, that Plaintiff had failed to create a triable issue as to whether Store Director Pete King even knew Plaintiff was pregnant at the time of her transfer, and that Plaintiff had admitted that King did not discriminate against her on the basis of her pregnancy. *See* Order Granting Summary Judgment at 2-3. Rule 60(b) is not to be used as a substitute for an appeal. *McCarthy v. Mayo*, 827 F.2d 1310, 1318 (9th Cir. 1987).

(sex and marital status discrimination); *see* Motion at 13 (arguing that Plaintiff was transferred because of Mr. King's marital status and pregnancy discrimination). Plaintiff claims that she was not the least senior employee at the time of her transfer, and that, based on seniority, Albertson's employee Pepper Smith should have transferred instead. *See* Motion at 22-23.

The procedural history of this case is as follows: Plaintiff Shannon Casey first filed her complaint alleging sex and marital status discrimination and sexual harassment in violation of the California Fair Employment and Housing Act on June 27, 2000. At the scheduling conference held on November 13, 2000, the Court set a discovery deadline of April 2, 2001, Defendant Albertson's Inc. then filed its first motion for summary judgment on December 11, 2000; the Court denied that motion on January 10, 2001.

On March 7, 2001, the Court entered a stipulation and order extending the discovery deadline to April 30, 2001. A second stipulation and order, entered on April 25,2001, further extended the discovery deadline to May 28, 2001. Plaintiff's original attorney moved to withdraw as counsel on April 30, 2001, and the Court granted his motion on May 14, 2001. Ms. Margery Melvin was substituted as Plaintiff's counsel on June 18, 2001, and on June 21, 2001 Plaintiff filed an *ex parte* application to further continue the discovery and trial dates set in this case. By order dated June 22, 2001, the Court granted Plaintiff's application and set the new discovery deadline, as requested by Plaintiff, for August 9, 2001.

Defendant Albertson's then moved again for summary judgment on June 25, 2001. On June 29, 2001, Plaintiff filed an *ex parte* application seeking to be relieved from her

admissions.[2] Magistrate Judge Zarefsky denied Plaintiff's *ex parte* application on June 29, 2001 as Plaintiff showed no basis for proceeding *ex parte*. Plaintiff then failed to file a properly noticed motion to be relieved from her admissions until well after the discovery cut-off had passed. Plaintiff's late-filed motion was withdrawn on August 29, 2001, after the Court admonished the parties that discovery motion practice would not be permitted past the discovery cut-off date.

Plaintiff filed another ex *parte* application on August 22, 2001 to further extend the discovery cut-off date and to continue the scheduled hearing on Defendant's pending motion for summary judgment. The Court denied Plaintiff's application, by order dated August 22, 2001, but instructed the parties that Plaintiff would be permitted to take depositions of several key witnesses even though the discovery deadline had passed. On August 27, 2001, the Court heard oral argument on Defendant's motion for summary judgment. The Court granted Defendant's motion by order entered August 28, 2001.

Plaintiff then filed this motion for relief from judgment on August 28, 2002.

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[2] Plaintiff failed timely to respond to Defendant's request for admissions, and pursuant to Federal Rule of Civil Procedure 36(a), the matters contained in Defendant's request were deemed admitted after thirty (30) days.

ANALYSIS

I. Legal Standards

Rule 60(b) provides for relief from judgment on several grounds, Rule 60(b)(l) identifies "mistake, inadvertence, surprise, or excusable neglect" as proper grounds for relief. Rule 60(b)(2) provides for relief based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." And Rule 60(b)(3) provides for relief based on fraud, misrepresentation, or other misconduct of an adverse party.

The decision whether to grant or deny relief under Rule 60(b) is committed to the sound discretion of the trial court, and the trial court's assessment will be reversed only "upon a clear showing of abuse of discretion." *Molloy v. Wilson*, 878 F.2d 313 (9th Cir. 1989). *See also De Saracho, et al, v. Custom Food Machinery, Inc., et al.*, 206 F.3d 874 (9th Cir. 2000) (quoting *Molloy).*

II. Timeliness

Any motion for relief under Rule 60(b)(1) (excusable neglect), Rule 60(b)(2) (newly discovered evidence), or Rule 60(b)(3) (fraud or misconduct) must be filed within one year of the Court's entry of judgment. Fed. Rule Civ. Proc. 60(b). However, this year period is an outer limit. *See* 11 Charles Alan Wright, *et al.*, Federal Practice and Procedure § 2866 (2d ed. 1995) [hereinafter "Wright & Miller"].[3] Rule 60(b)

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[3] Although Plaintiff's notice of motion and motion were filed on August 28, 2002, exactly one year after entry of judgment, Defendant argues that because Plaintiff did not file her exhibits in

motions must be brought within a "reasonable time." Fed. R. Civ. Proc. 60(b). "What constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied on, and prejudice to other parties." *Ashford v. Steuart,* 657 F.2d 1053, 1055 (9th Cir. 1981). Where the time for appeal has passed, the interest in finality is given greater weight. *Id.*

In this case, Plaintiff delayed filing this motion until the last possible day. Plaintiff's attorney, Ms. Patricia Barry, herself describes the delay as "interminable." Barry Decl. in Reply to Defendant's Opposition, ¶ 10.[4] In addition, Ms. Barry indicates that she met and conferred with Defendant as to this motion in October of 2001, *see id.* ¶ 2, and that Plaintiff's memorandum in support of this motion was substantially complete several months after entry of judgment, *id.* ¶ 9 ("I had just about completed Ms. Casey's points and authorities, and the declarations within a few months of the entry of judgment."). Yet Plaintiff delayed in filing this motion for a full year, likely leading Defendant to believe that she would not do so.

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support of that motion until August 29, 2002. Plaintiff's August 28 filing was incomplete and Plaintiffs motion does not satisfy even the one-year outer limit established by Rule 60, The Court declines to apply Local Rule 7-5- which defines a party's moving papers to include the evidence on which a party will rely- so strictly as to render Plaintiff's motion untimely under the one-year rule.

[4] Defendant objects to Ms. Barry's declaration on the ground that it should have been submitted with Plaintiff's motion. The Court overrules this objection as it finds Ms. Barry's declaration to be proper as rebuttal evidence under Local Rule 7-10.

Plaintiff offers only a very weak reason to explain her delay in filing this motion. In her declaration, Ms. Barry indicates that the delay was caused by Plaintiff's desire to prepare a revised statement of genuine issues ("SGI"). *Id.* ¶ 10. However, Plaintiff has still failed to present an adequate SGI. Although Plaintiff indicates in her declaration that she has had a difficult time since entry of judgment, Casey Declaration in Reply to Defendant's Opposition, Ex. 1 ¶ 3, the SGI she attaches remains substantially incomplete and haphazard. *See* Barry Decl. Ex. 2.

While Plaintiff points out that her delay was "fortuitous[]", Reply at 8, and "just as well," Barry Decl, ¶ 11, because Plaintiff located Pepper Smith only shortly before the one-year outer time limit for filing this motion, Plaintiff does not argue that her delay was *caused by* any consistent efforts to locate Ms. Smith. Nor could Plaintiff so argue. Although the issue of Ms. Smith's seniority relative to Plaintiff has always been important in this case, Plaintiff's efforts to locate Ms. Smith can be described as sporadic at best, *see* Casey Decl. Ex. 1 ¶ 4 (explaining that Jason Wall and Roxanne Harrigan tried to help Plaintiff locate Ms. Smith), and ultimately Ms. Smith was located not because of Plaintiff's efforts, but because Plaintiff's attorney happened to learn of a search service shortly before filing this motion, Barry Decl. ¶¶ 11-13. With the help of that service, Ms. Smith was located in short order. *Id.* While Ms. Barry indicates that Plaintiff was unable to afford an investigator to find Ms. Smith, Barry Decl. ¶ 11, this financial difficulty is insufficient to justify Plaintiff's lengthy delay. *Cf. Rinieri v. News Syndicate Co.*, 385 F.2d 818, 823 (2d Cir. 1967) (financial difficulty not sufficient to justify relief under Rule 60(b)(6)).

Under *Ashford,* this Court also will consider Plaintiff's practical ability to learn earlier of the grounds relied on in her motion. Here, Plaintiff was aware of the facts and law supporting her excusable neglect argument at the time of entry of judgment. In addition, nearly all the evidence on which Plaintiff now relies was available to Plaintiff either prior to the August 28, 2001 grant of summary judgment or soon thereafter. For example, Plaintiff offers several witness declarations that were obtained in the fall of 2001. Harrigan Decl. (dated September 4, 2001); Wall Decl. (dated Novembor 2001); Cano Decl. (dated November 28, 2001). *See also* Azurdia Decl. (not dated). In support of her fraud allegations, Plaintiff does rely on the recently obtained declaration of Ms. Smith. However, as indicated above, Plaintiff could have and should have obtained Ms. Smith's declaration much earlier - either before entry of judgment or soon thereafter. In addition, the deposition testimony of Ms. Connie Leyva, Plaintiff's union representative at the Ontario store, was previously available to Plaintiff. Ms. Leyva offered testimony that she concluded, after speaking with an Albertson's human resources employee, that Plaintiff was improperly transferred. Plaintiff's Exhibits, Leyva Depo. 25:17-26:2.

Having considered the *Ashford* factors, the Court finds Plaintiffs motion for relief from judgment not to have been timely filed. Even if Plaintiff had filed her motion within a "reasonable time," however, the Court finds, for the reasons set forth below, that Plaintiff would not be entitled to relief under Rule 60(b).

III. Excusable Neglect

Plaintiff argues that site should be relieved from this Court's grant of summary judgment because of excusable

neglect. Specifically, Plaintiff argues that her attorney, Ms. Melvin, was neglectful in filing a Statement of Genuine Issues that did not point to any evidence to controvert Defendant's uncontroverted facts. *See* Reply at 7. *See also* Order Granting Summary Judgment ("[P]laintiffs statement of genuine issues points to no evidence whatsoever controverting any of defendant's uncontroverted facts."). For the following reasons, the Court denies Plaintiff's motion brought under Rule 60(b)(1).

As Plaintiff is accountable for the acts and omissions of her attorneys, *see Pioneer Investment Services Co. v. Brunswick Assoc. Limited Partnership, et al.*, 570 U.S. 380, 396-97 (1993), William W, Schwarzer, *et al.*, California Practice Guide: Federal Civil Procedure Before Trial ¶ 6:173 (The Rutter Group 2002) [hereinafter "Rutter Practice Guide"], the issue before the Court is whether Ms. Melvin's neglect is excusable such that relief under Rule 60(b)(1) is justified, *Pioneer*, 570 U.S, at 397. The question of whether neglect is excusable is an equitable one that depends on at least four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. *Id.* at 395.

While the first and fourth factors do not weigh against Plaintiff,[5] the other two *Pioneer* factors do weigh strongly

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[5] The danger of prejudice to Defendant is that if this Court were to vacate its earlier judgment, Defendant would again have to argue its summary judgment motion. Loss of a quick victory is not alone enough to justify denying relief. *Bateman v. United States Postal Service, et al.*, 231 F.3d 1220, 1224-25 (9th Cir. 2000). While Defendant's victory in this case was not exactly quick, this possible prejudice to Defendant is insufficient by itself to justify denying

against granting Plaintiff relief under Rule 60(b)(1). The delay in this case is extreme. Plaintiff waited an entire year beforc filing this motion based on Rule 60(b)(l). *Cf. Bateman,* 231 F.3d at 1225 (relief appropriate: in part because Plaintiff filed Rule 60(b)(l) only two months after entry of judgment). Plaintiffs lengthy delay is inexcusable and shows a disturbing lack of regard for the court's docket.

Plaintiff also offers only very weak reasons to excuse the original neglect and subsequent delay. Plaintiff argues that the filing of an incomplete SGI is excusable because her attorneys "did the best they could" and because Ms. Melvin was perhaps overwhelmed. However, the Court repeatedly continued discovery and trial dates in this case. Moreover, the ordinary press of business is generally not an adequate excuse. *See Pioneer*, 507 U.S. at 396 ("In assessing the culpability of respondents' counsel, we give little weight to the fact that counsel was experiencing upheaval in his law practice . . . ."); *United States ex rel. Familian Northwest, Inc, v. RG&B Contractors, Inc.*, 21 F.3d 952, 956 (9th Cir. 1994): Wright & Miller § 2858 (noting that relief has been denied where carelessness ascribed to "demands of being a busy lawyer" and citing cases); William W. Schwarzer, *et al.*, California Practice Guide: Federal Civil Procedure Before Trial (Rutter Group 2002) ¶ 6:174.

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relief. *See Hibernia Nat'lBank v. Administracion Cent. Sociedad Anonima*, 776 F.3d 1277, 1280 (5th Cir. 1985) ("the mere possibility of prejudice from delay, which is inherent in every case, is insufficient to require denial of a 60(b)(1) motion") (cited by *Bateman*, 231 F.3d at 1225). There is also no evidence that Plaintiff, or her attorney, acted deviously or willfully, *cf. Bateman*, 231 F.3d at 1225.

Plaintiff does not present any extenuating circumstances that would justify relief. *Cf. Bateman*, 231 F.3d at 1224-25 (plaintiff's attorney traveled to Nigeria for family emergency); *Briones v. Riviera Hotel & Casino,* 116 F.3d 379, 380, 382 (9th Cir. 1997) (remanding for consideration of the *Pioneer* factors where pro se plaintiff, not proficient in English, failed to timely oppose motion to dismiss). Ms. Melvin has filed no declaration in support of Plaintiff's application asserting any extenuating circumstances. Nor has her co-counsel, Ms. Patricia Barry, offered any explanation for her failure to discover that the SGI was substantially incomplete before the Court held its hearing on that motion. In addition, and as discussed above, the Court finds unpersuasive Plaintiff's argument that her subsequent delay in filing this motion is justified by Plaintiff's desire to submit a revised SGI.

In *Bateman*, the Ninth Circuit recently considered the *Pioneer* factors in assessing an instance of attorney neglect under Rule 60(b)(1). Faced with factual circumstances very different from those here, the *Bateman* panel found relief under Rule 60(b)(1) appropriate. Plaintiff's attorney in *Bateman* failed to respond to a defendant employer's summary judgment motion because he was out of the country tending to a family emergency during the relevant period, but he then wrote to the court twelve days after entry of summary judgment asking that it rescind its judgment, 231 F.3d at 1223. Plaintiff's attorney also filed a Rule 60(b)(l) motion little more than a month later, only two months after the Court's grant of summary judgment. *Id.* In addition, the defendant in *Bateman* knew of plaintiff's counsel's absence but failed to inform the court. *Id.*

None of these circumstances is present here. Plaintiff did not communicate with the court soon after the grant of

summary judgment, nor did she promptly offer a revised statement of genuine issues. In fact, Plaintiff remains unable to present the Court with a revised SGI. Unlike in *Bateman,* neither Plaintiff *nor* her attorney was out of the country tending to a family emergency during the relevant period. While the *Bateman* court found even the reason offered for delay in that case to be weak, *see* 231 F.3d at 1225, Plaintiff's asserted reasons are much weaker. Finally, the defendant in *Bateman* refused to stipulate to extended time and then failed to inform the court that plaintiff's attorney was out of the country. 231 F.3d at 1223. Defendant Albertson's did not do so here.

IV. Newly Discovered Evidence

Plaintiff seeks to offer much new evidence in support of her argument that the Court should reconsider its grant of summary judgment.[6] Specifically, Plaintiff seeks to offer portions of the Collective Bargaining Agreement governing Plaintiffs employment, a letter sent by Andrew Scroggins, Albertson's Director of Labor Relations, to the California Department of Fair Employment and Housing (dated December 30, 1998), and two doctors' slips pertaining to Ms. Casey's pregnancy.[7] *See* Plaintiffs Exhibits 1-4. Plaintiff also offers the declaration of Dolores Leal, an attorney who

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[6] Defendant has filed objections to much of Plaintiff's proffered evidence. As the Court finds, for the reasons set forth below, that this evidence does not justify relief from judgment under Rule 60(b)(2), the Court need not rule on Defendant's evidentiary objections.

[7] Although Plaintiff does not specify, it appears likely that much of this documentary evidence was in Plaintiffs possession prior to entry of summary judgment.

represented another plaintiff in an entirely separate suit against Albertson's, as well as the deposition testimony of Stephen Deering, Field Director for United Food & Commercial Workers Union ("UFCW"), Local 770 (deposition taken August 9, 2001), and of Connie Marie Leyva, UFCW representative, Local 1428 (deposition taken June 19, 2001).

In addition, Plaintiff offers the declaration of Pepper Smith, who states that prior to being hired at Albertson's Store 6187, she had no experience working at a Max Foods store, or any grocery store, that might have entitled her to additional seniority credit. Smith Decl. ¶ 2. Plaintiff offers this declaration in support of her argument that Ms. Smith, not Plaintiff, was the least senior employee at the time of Plaintiffs transfer. Finally, Plaintiff offers declarations of several current and former Albertson's Store 687 employees: Roxanne Harrigan,[8] Oscar Valdez, Jason Wall, Richard Cane, and Sedrick Azurdia.[9] Harrigan declares (1) that Pete King, the Store Director, was aware of Plaintiff's pregnancy before Plaintiff's transfer, Harrigan Decl. ¶ 16, (3) that Mr. Deering eventually admitted that Plaintiff was not the least senior

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[8] Plaintiff also submitted statements made by Roxanne Hardgan and Jason Wall in opposition to Defendant's summary judgment motion. However, those statements were not admissible declarations made under penalty of perjury.

[9] The Court notes as a preliminary matter that various parts of these declarations are irrelevant to Plaintiff's claims of sex and marital discrimination or sexual harassment, *see, e.g.*, Azurdia Decl. (largely pertaining to allegations of racism), or conflict with evidence that Casey offered in opposition to summary judgment and that the Court found insufficient to create a triable issue of fact. *See* Order Granting Summary Judgment at 4.

employee at the time of her transfer, Harrigan Decl. ¶ 12, and (4) that she observed Mr. King paying particular attention to Plaintiff, Harrigan Decl. ¶ 14. Messrs. Valdez, Wall, Cano and Azurdia describe having witnessed incidents of the alleged harassment.

Plaintiffs efforts to re-argue the merits of Defendant's summary judgment motion indicate that Plaintiff misunderstands the nature and scope of her current Rule 60 motion. The Court will not reconsider the merits of its prior judgment unless Plaintiff establishes that relief from that judgment is appropriate under Rule 60. Specifically, Rule 60(b)(2) provides for relief from judgment based on evidence that (1) existed at the time of the court's prior decision, (2) could not have been discovered through due diligence, and (3) is 'of such magnitude that production of it earlier would have been likely to change the disposition of the case.'" *Jones v. Aero/Chem Corp. et al.*, 921 F.2d 875, 878 (9th Cir. 1990) (quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211-12 (9th Cir. 1987), *See also Batzel v. Smith*, 2001 WL 1894435, *1 (C.D. Cal. 2001), *See also* 11 Wright & Miller § 2859.

Here, Plaintiff fails to satisfy this test. As to the declarations obtained since August of 2001, Plaintiff offers no explanation as to why they could not have been obtained prior to entry ofjudgment; in other words, Plaintiff fails to establish that with due diligence such evidence could not have been obtained prior to summary judgment. As to the Leyva deposition, Plaintiff faults Defendant's counsel Kathleen Talley for not having ordered a transcript of the deposition, conducted on June 19, 2001. However, Plaintiff was represented and present at Ms. Leyva's deposition, was therefore aware of Ms. Leyva's testimony, and does not offer any evidence that she requested a transcript herself. In her

declaration filed in reply, Plaintiff details some difficulty she did have in ultimately obtaining a transcript from the court reporting service. Casey Decl. Ex, 1 at 3, ¶ 8.[10] However, Plaintiff does not indicate when her conversations with the court reporting service took place - in other words, whether Plaintiff even requested a copy of the deposition before or after entry of summary judgment. The Court has also previously noted the deficiencies concerning Plaintiff's efforts to locate Pepper Smith.

Plaintiff fails to establish that the new evidence she offers could not have been discovered through due diligence; thus, the Court need not consider whether Plaintiff's proffered evidence would have been likely to change the disposition of the case.[11] As the Court noted in its order granting summary judgment, *see* Order Granting Summary Judgment at 6-7, Plaintiff simply was not diligent in conducting discovery, Plaintiff is not now entitled to relief from judgment under Rule 60(b)(2).

V. Fraud

Plaintiff also argues that she is entitled to relief from judgment based on fraud. Rule 60(b)(3) provides for relief based on the fraud, misrepresentation or misconduct of an

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[10] As with Ms. Barry's declaration, Defendant objects to Plaintiff's declaration on the basis that it should have been filed with Plaintiff's motion papers. The Court overrules this objection as it finds Plaintiff's declaration to be proper as rebuttal evidence under Local Rule 7-10.

[11] The Court notes, however, that its grant of summary judgment against Plaintiff was also supported by Plaintiff's own admissions. *See* Order Granting Summary Judgment at 3.

adverse party. Plaintiff argues that union employees Stephen Deering and Luvenia Carr, and Alberston's employees Craig Cude and Andrew Scroggins, each engaged in fraud. Motion at 6. In essence, Plaintiff argues, as she has throughout, that Ms. Pepper Smith, not Plaintiff, was the least senior employee at the time of Plaintiff's transfer. Plaintiff offers the declaration of Ms. Smith as support for her argument.

Although Plaintiff argues that the evidence she now offers creates an "inference of fraud," Reply at 9, this is not sufficient. Plaintiff must establish fraud by clear and convincing evidence in order to be entitled to relief. *De Saraeho v. Custom Food Machinery*, 206 F.3d 874, 880 (9th Cir. 2000). Rule 60(b)(3) "is aimed at judgments which were unfairly obtained, not at those which are factually incorrect." *In re M/V Peacock*, 809 F.2d 1403, 1405 (1987). Plaintiff must establish that Defendant's alleged fraud prevented her from fully and fairly presenting her case. *De Saracho*, 206 F.3d at 880. The Ninth Circuit has held that a party seeking relief from judgment based on fraud must demonstrate why, with due diligence, the party could not have discovered the alleged fraud prior to entry ofjudgment. *Pacific & Arctic Ry. & Navigation Co. v. United Transp. Union*, 952 F.2d 1144, 1148 (9th Cir. 1991). To prove fraud, Plaintiff must demonstrate that Defendant made false representations of material fact, that Defendant intended to induce Plaintiff to act, that Defendant's representations were made with knowledge of, or reckless disregard for, their falsity, and that Plaintiff justifiably relied upon those false representations to her detriment. *Bulgo v. Munoz*, 853 F.2d 710, 716 (9th Cir. 1988). The Court finds that Plaintiff has failed to prove fraud by clear and convincing evidence.

As a preliminary matter, the Court notes that its order granting summary judgment did not rely solely on

Defendant's claimed legitimate nondiscriminatory reason for Plaintiff's transfer - namely, that Plaintiff was the least senior employee. *See Berg v. Polis*, 1997 WL 573418 (N.D. Cal. 1997) (finding that movant had more than adequate opportunity to present its case fully and fairly where evidence defendant allegedly hid from movant would not have changed the Court's grant of summary judgment). Specifically, the Court also held that summary judgment as to Plaintiffs sex, marital status and pregnancy discrimination claims was appropriate in light of Plaintiff's admissions. *See* Order Granting Summary Judgment at 34. Plaintiff, by failing to respond to Defendant's requests for admissions, admitted that (1) King did not discriminate against her on the basis of her gender; (2) King did not discriminate against her on the basis of her marital status; (3) King did not discriminate against her on the basis of her pregnancy; and (4) King did not make the decision to transfer her. *Id.* These admissions provided an alternative basis for the Court's grant of summary judgment, and they are not affected by Plaintiff's allegations of fraud.

As support for her fraud allegations, Plaintiff points out that Mr. Craig Cude, Contract Administrator in the Albertson's Labor Relations Department (located in Boise, Idaho), and Mr. Andrew Scroggins, Albertson's Director of Labor Relations, apparently did not agree as to the exact time when Alberston's determined that Plaintiff was the least senior employee and that she should be transferred. In a letter to the California Department of Fair Employment and Housing, dated December 30, 1998, Mr. Scroggins indicated that Plaintiff was selected for lay-off or transfer in June of 1998. *See* Plaintiffs Ex. 2, at 1. In his declaration offered in support of Defendant's summary judgment motion, Mr. Cude indicated that Plaintiff was selected for lay-off or transfer in July of 1998. Cude Decl. In Support of Defendant's Motion for Summary Judgment ¶ 6. Given the date of Mr.

Scroggins' letter, this conflicting evidence as to timing appears to have been available to Plaintiff prior to entry of judgment. Moreover, the Court finds that this minor inconsistency is not sufficient to prove, by clear and convincing evidence, that either Mr. Scroggins or Mr. Cude engaged in fraud. *See Kolstad v. Untied States*, 262 F.2d 839, 843 (9th Cir. 1959) (erroneous witness testimony not sufficient to re-open judgment).

Plaintiff's argument also may construed as alleging that Ms. Luvenia Carr, Plaintiff's union representative at Store 6187, or Mr. Stephen Deering, the union field director, offered false testimony during deposition. Ms. Carr testified in deposition that after Plaintiff filed a grievance with respect to her transfer, Ms. Carr reviewed Defendant's seniority lists, as well as Ms. Smith's payroll records. Carr Dep. At 35:20-36:6 (Talley Decl., Ex. B., Filed in Support of Defendant's summary judgment motion). Based on those records Ms. Carr determined that Ms. Smith was more senior than Plaintiff because she had previously worked at an Albertson's Max Foods store. *Id.* Mr. Deering testified in deposition that he reached the same conclusion, based on the research conducted by Ms. Carr.[12] *See, e.g.*, Plaintiff's Exhibits, Deering Dep. 68:12-17. In her declaration, however, Ms. Smith indicates that she never worked at a Max Foods store, or any other grocery store, before being hired to work at Store 6187. Smith Decl. ¶ 2.

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[12] In its motion for summary judgment, Defendant relied on the deposition testimony of Ms. Carr and Mr. Deering as support for its argument that, at the time of Plaintiff's transfer, her union took the position that Plaintiff was properly transferred based on seniority. Even if Plaintiff was improperly determined to have been the least senior employee, it remains undisputed that her union did take this position.

Fraud committed by a non-party may be grounds for relief under Rule 60(b)'s general prohibition against "fraud on the court." *See* Alexander v. Robertson, 882 F.2d 421,424-425 (9th Cir. 1989) (stating rule but finding that attorney's misconduct did not justify relief); *Toscano v. Commissioner*, 441 F.2d 930, 934-37 (9th Cir. 1971) (fraud by complainant's husband and attorney). For Rule 60(b) purposes, "fraud on the court" is construed narrowly, *Luttrell v. United States*, 644 F.2d 1274, 1276 (9th Cir. 1981), and perjury committed by a witness is not normally fraud on the court, *Levander v. Prober, et al.* (In re *Levander)*, 180 F.3d 1114 (9th Cir. 1999) (stating general rule but finding fraud on the court where neither court nor parties had reason to question veracity of testimony). Here, the Court finds that Plaintiff has failed to prove fraud by clear and convincing evidence, Ms. Smith's payroll or employment records, which Ms. Carr claimed to have reviewed, simply are not before the Court. Defendant apparently did not produce them as part of its initial disclosures, and Plaintiff never served any document production requests in this case.

Moreover, Plaintiff has not established why she could not have discovered the circumstances of this alleged fraud prior to entry of judgment. Ms. Carr's allegedly fraudulent deposition took place in June 19, 2001, nearly one year after Plaintiff first filed her complaint. While Pepper Smith's payroll and employment records may have been in Defendant's sole possession, and while Plaintiff has apparently made some efforts to locate Ms. Smith, Plaintiff's declaration does not indicate whether Plaintiff made any effort to locate Ms. Smith prior to the Court's grant of summary judgment, *see* Casey Decl. Ex. 1 at 2, ¶ 4. In addition, prior to summary judgment, Ms. Connie Leyva testified during deposition that after speaking with an Albertson's employee in Idaho, she determined that Plaintiff had been mis-identified

as the least senior employee at the time of her transfer, Plaintiff's Exhibits, Leyva Depo, 25:17-16:2. Plaintiff was represented at Ms. Leyva's deposition, yet despite the apparent conflict between Ms. Leyva's and Ms. Cart's assessment, Plaintiff failed to diligently address this issue. The fraud Plaintiff now alleges did not prevent her from fully and fairly presenting her case.

Finally, Plaintiff suggests that Defendant acted improperly by not having produced Ms. Smith's employment records, Discovery misconduct, if proved, may be grounds for relief under Rule 60(b)(3). *See Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878-879 (9th Cir. 1990). As to Ms. Smith's employment records, however, Plaintiff does not argue that Defendant was required to produce them as part of its initial disclosures under Federal Rule of Civil Procedure 26(a).[13] Plaintiff also did not serve Defendant with any document production requests. *See De Saracho*, 206 F.3d at 880-81 (no misconduct where plaintiffs were not required initially to provide allegedly withheld documents and where documents were not covered by movant's document requests).

For the foregoing reasons, the Court finds that Plaintiff has not proved fraud by clear and convincing evidence and that Plaintiff, in any event, could have discovered the circumstances of the alleged fraud with due diligence.

CONCLUSION

Plaintiff's motion for relief from judgment under Rule 60(b) is DENIED. Plaintiff has not established that she is

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[13] Rule 26(a) requires a party to provide documents it may rely on in support of its claims or defenses.

entitled to relief based on excusable neglect, newly discovered evidence or fraud.

IT IS SO ORDERED

DATE: November 25, 2002

/s/
A. Howard Matz
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 00-06950 AHM (Rzx) **Dated August 27, 2001**

Title: Casey v. Albertson's, Inc.

DOCKET ENTRY [Filed August 28, 2001]

PRESENT: THE HONORABLE A. HOWARD MATZ, JUDGE

Stephen Montes	**Lynne Smith**
Courtroom Clerk	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:
Margery Melvin

ATTORNEYS PRESENT FOR DEFENDANTS:
Kimberly Talley

PROCEEDINGS: Motion for Summary Judgment

The Court held a hearing on August 27, 2001 on defendant's motion for summary judgment. Good cause appearing therefor, and for all the reasons set forth below, defendant's motion is GRANTED.

A. Gender and Marital Status Discrimination

Plaintiff's opposition proffers just one paragraph of argument opposing summary judgment on her claim of gender and marital status discrimination. In its entirety it reads:

> Plaintiff testified in deposition that when Pete King discovered that she was married and pregnant, he began to treat her differently. She believes that her condition and status prompted him to transfer her to the Albertson's store in Ontario, California.

Opposition, p.10-11. The paragraph cites to no evidence in the record.

Moreover, plaintiff's statement of genuine issues points to no evidence whatsoever controverting any of defendant's uncontroverted facts. See Local Rule 7.14.3 ("In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the "Statement of Genuine Issues" and (b) controverted by declaration or other written evidence filed in opposition to the motion"). Pertinent to plaintiff's claims for gender and marital status discrimination, plaintiff does not controvert any of the following facts:

• Plaintiff began her employment at the Company on December 2, 1997 as a checker. DSUF 1. • The terms and conditions of Plaintiff's employment were governed by a collective bargaining agreement. DSUF 5. • Plaintiff received a copy of the collective bargaining agreement when she commenced her employment with the Company. DSUF 6. • In May, July, August, September and October 1998,

approximately 25 employees were laid off or given the option to transfer or accept layoff as a part of a reduction-in-force. DSUF 8. • As per the collective bargaining agreement, employees are selected for layoff based upon their seniority date. DSUF 9. • Under the terms of the collective bargaining agreement, the last four digits of an employee's social security number serves as a tie breaker where employees have the same seniority date. DSUF 11. • In October 1998, pursuant to the collective bargaining agreement, after being selected for reduction-in-force, Plaintiff was given the option to accept layoff at Store 6187 or transfer to Store 690 located in Ontario, California. DSUF 15. • Rather than be laid-off, Plaintiff elected voluntarily to transfer to Store 690 in Ontario, California. DSUF 16. • According to the Company's seniority list, Plaintiff was the least senior retail clerk at the time of the reduction-in-force. DSUF 20. • Plaintiff's union representative, Luvenia Carr, advised her that she was the least senior employee under the collective bargaining agreement. DSUF 21. • It was the position of Union Local 770 that Plaintiff was the least senior employee at Store 6187 at the time of her transfer to Store 690. DSUF 22. • Plaintiff's union representative, Carr, reviewed the seniority list used for Plaintiff's selection for reduction-in-force and concluded that it was correct. DSUF 23. • Although Plaintiff believed that Pepper Smith, another food clerk, was less senior than she was at the time she was selected for reduction-in-force, Carr, Plaintiff's union representative investigated Plaintiff's claim and concluded that Smith was not, in fact, less senior than Plaintiff. DSUF 25. • A store director such as King does not generate the seniority list or control which employees will or will not be laid off in a reduction-in-force. DSUF 34.

Moreover, as defendant points out in its reply plaintiff has not raised a triable issue as to whether Pete King even knew

that she was pregnant at the time she was, initially selected for reduction in force. Reply, p. 11-15.

Finally, plaintiff never responded to defendantes first set of requests for admissions. Under FRCP 36(a) the matter of any request to admit is admitted unless timely responded to. Plaintiff therefore admitted that (1) King did not discriminate against her on the basis of her gender; (2) King did not discriminate against her on the basis of her marital status; (3) King did not discriminate against her on the basis of her pregnancy; (12) King did not make the decision to transfer her to store 690. Although plaintiff sought to have the admissions withdrawn, Magistrate Judge Zarefsky denied her request without prejudice on July 2, 2001. Plaintiff has not sought further relief from the admissions.

In light of plaintiff's admissions, failure to dispute any of defendant's uncontroverted facts, and failure to comply with the Local Rules, summary judgment is appropriate on her gender and marital status discrimination claims. In particular, plaintiff has not raised a genuine issue that the reduction in force was a pretextual basis for her transfer.

B. Sexual Harassment - Hostile Work Environment

In opposing summary judgment on her sexual harassment claim, plaintiff proffers one paragraph of argument. In its entirety it reads:

> In this case, as indicated in plaintiff's declaration and the exhibits attached to plaintiff's declaration in support of plaintiff's opposition to the motion for summary judgment, plaintiff was subjected to sexual harassment. On a daily basis from April 1998 through June 28, 1999, King touched plaintiff's hair, rubbed

> up against her, stared at her body parts for extended periods of time, asked her to come to his home, asked her out on dates, called her into his office while she was working amongst other things. Defendant attempts to argue that the sexual harassment consisted of a couple of isolated, light-hearted incidences. This is not the case as indicated in the attached declaration and supporting documents. Therefore, the Court should deny defendant's motion for summary judgment.

Opposition, p.8-9. Plaintiff cites to no specific evidence in the record to support this argument. Moreover, Plaintiff's declaration is merely a collection of exhibits, only the statements of co-workers Roxanne Harrigan and Jason Wall, attached to Casey's declaration, are relevant to plaintiff's sexual harassment allegations, and neither of the statements is an admissible declaration made under penalty of perjury.

However, defendant's own statement of uncontroverted fact points to admissible evidence in the record relevant to the sexual harassment issue:

> Plaintiff testified that King's alleged sexual harassment consisted of him twice bumping into her while in the checkstand, twice running his hands through the bottom of her hair in the presence of customers and other co-workers, making two comments about her hair, making one comment about her lipstick, showing her favoritism by allowing her to take longer breaks, asking her out to lunch, and talking to her about his marriage and her marriage.

DSUF 41 (citing to Casey Depo. (Exh. A. to Talley Decl.) at 50:21-51:22, 52:3-5, 54:19-55:5, 57:18-23, 61:4-10, 72:14-

18, 123:3-14). Moreover, the DSUF (42) asserts that "The conduct which Plaintiff attributes to King, which forms the basis of her sexual harassment claim, occurred between approximately March 1998 and June 1998." In fact, she worked at that store, with King as a co-worker, for at least seven months.

Ms. Casey also testified that King never took his hand and patted her on the butt (Casey Depo., p.72); never tried to kiss her (*Id.* At 72); never otherwise touched her in a manner she thought inappropriate *(Id.* At 72-73); only one of the two "rubbing" incidents at the checkout counter was intentional *(Id.* At 52); King told no dirty jokes *(Id.* At 97); he made no requests for sexual favors *(Id.* At 106); and he never conditioned her employment on her submitting to sexual advances (*Id.*)

The question is whether these alleged incidents between March 1998 and June 1998 were so severe and pervasive as to alter the conditions of plaintiff's employment and create an abusive working environment. *See Fisher v. San Pedro Peninsula Hospital*, 214 Cal.App. 3d 590, 608 (1989). None of the individual incidents, standing alone, is sufficiently severe to create a triable issue. Based on the current record, even taken together they are not enough to withstand summary judgment.

Defendant asserts that in any event, it is entitled to a defense under *Burlington v. Ellerth*, 524 U.S. 742 (1998). An employer can escape vicarious liability for a supervisor's alleged sexual harassment by proving:

> that (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee

> unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Here, Albertson's had a sexual harassment policy at the time of the alleged harassment and plaintiff was aware of it. DSUF 60-65. Defendant asserts that plaintiff did not comply with the policy because she did not call the 1-800 Hotline described in the policy to report any harassment and did not report any sexual harassment when she was interviewed in May 1998 during a sexual harassment investigation involving another co-worker at the store. DSUF 67, 69-72.

However, the DSUF states that "plaintiff alleges that she complained to . . . Michael Derby, the grocery manager" regarding King's conduct. DSUF 74. Although she points to no specific evidence in the record, plaintiff in her opposition asserts that she complained to her union Representative Luvenia Carr. Opposition, p.11. Looking to plaintiff's deposition testimony, plaintiff certainly did not formally complain to Derby about any specific conduct by King. DSUF 75. However, she did purportedly tell Derby, upon having had her hair done, that "I don't think I'll be able to handle this. You need to talk to Pete." Casey Depo., 204:4-6. That is remarkably imprecise and insufficient to create a triable issue.

Summary judgment is appropriate on *Ellerth* grounds.

Moreover, as with plaintiff's gender/marital status discrimination claims, plaintiff, by not responding to defendant's request for admissions, has admitted facts that defeat her claims, specifically, plaintiff may be deemed to have admitted that (1) King did not sexually harass her; (2) Plaintiff did not report alleged sexual harassment while it was

occurring to Albertson's management or the 1-800 Hotline; and (3) Defendant offered but plaintiff did not take advantage of corrective opportunities.

Finally, defendant asserts that plaintiff's sexual harassment claim is barred because she made no sexual harassment allegation to the DFEH until over a year after the final incidents of alleged harassment. With several exceptions not applicable here, a DFEH complaint must be filed within one year of the alleged unlawful practice. Cal Gov. Code § 12960.

Here, plaintiff points to no specific evidence rebutting that King was *not* at work on her last day, June 28, 1998, and that the last instances of harassment occurred before that. DSUF 77, 81. Defendant asserts that although plaintiff filed her initial DFEH complaint on November 2, 1998, within the one-year window, the initial complaint made no allegation of sexual harassment. Instead, it was not until plaintiff amended the DFEH complaint on June 28, 2001, outside the one-year window, that she even arguably alleged any sexual harassment. (This Court found, on defendant's prior motion for summary judgment, that the *amended* DFEH complaint sufficiently related to allegations of sexual harassment to preclude summary judgment).

Plaintiff asserts, without citation to any support in the record, that there were instances of harassment after June 28, 1998: King's transfer of plaintiff in October 1998 and that King "peered at her in November 1998." Opposition, p.13. However, even if supported by evidence, there is no basis for construing these acts as sexual harassment.

Note that neither party has addressed whether the amendment of the DFEH complaint relates back to the

original filing date of the complaint. This would help determine whether plaintiff's sexual harassment claim is barred, but because of the above rulings, it is unnecessary to resolve this issue.

C. Punitive Damages

It is unnecessary to address this issue but the Court does note that Defendant asserts that plaintiff cannot be entitled to an award of punitive damages from Albertson's because

> there is no evidence that any officer, director or managing agent of Albertson's acted with malice, oppression or fraud or ratified any such conduct. Indeed King as store director did not exercise the required substantial independent authority and judgment over decisions that ultimately determined corporate policy.

Motion, p.25; DSUF 84.

Plaintiff does not respond at all to defendant's punitive damages contentions although her declaration includes an improperly authenticated article from a website that refers to King as the store manager and describes King discussing Albertson's hiring of employees. Casey Decl. Exh. C. This is insufficient to raise a triable issue.

D. FRCP 56(f) Continuance

In her opposition, p.13, plaintiff requests "a continuance of the summary judgment hearing pending completion of additional discovery." The Court previously extended the discovery cutoff. However, the Court rejects this request for the same reasons it rejected plaintiff's ex parte application to

continue this hearing; plaintiff has not been diligent in conducting discovery and has not shown how additional discovery will provide her the essential facts necessary to oppose Albertson's motion for summary Judgment,

IT IS SO ORDERED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 00-06950 AHM (Rzx) **Dated August 22, 2001**

Title: Casey v. Albertson's, Inc.

DOCKET ENTRY

PRESENT: THE HONORABLE A. HOWARD MATZ, JUDGE

Stephen Montes	**None**
Courtroom Clerk	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFF:
No appearance

ATTORNEYS PRESENT FOR DEFENDANTS:
No Appearance

PROCEEDINGS: IN CHAMBERS

The Court has received 1) plaintiff's ex parte application to extend the discovery cutoff date and to continue defendant's motion for summary judgment and 2) defendant's opposition. Good cause appearing therefor, the Court

DENIES plaintiff's application. Plaintiff may, however, take the depositions of Michael Darby, Ruven Pete King and Craig Cude beyond the discovery cutoff. But plaintiff may not resort to motion practice before the magistrate judge on any discovery issue after the discovery cutoff.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. **CV 00-06950 AHM (Rzx)** Date: **June 29, 2001**

Title: **SHANNON CASEY v. ALBERTSON'S, INC.**

PRESENT: **HON. RALPH ZAKEFSKY, UNITED STATES MAGISTRATE JUDGE**

Cynthia De La Torre/Illene Bernal
Deputy Clerk

ATTORNEY FOR PLAINTIFF:
None Present

ATTORNEY FOR DEFENDANT:
None Present

PROCEEDINGS: IN CHAMBERS - EX PARTE APPLICATION FOR AN ORDER FOR RELIEF FROM ADMISSIONS (FILED JUNE 29, 2001)

The ex parte application for an order for relief from admissions is DENIED. No basis appears for proceeding ex parte. *In re Intermagnetics America, Inc., 101 B.R. 191 (CD.*

Cal. 1989); Mission Power Engineering Co. v. Continental Cas. Co., 883 F. Supp. 488 (C.D. Cal. 1995).

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV00-6950-AHM (RZX)

Date and Filed: 5-14-01

Title: SHANNON CASEY -V- ALBERTSON'S, INC. ET AL

PRESENT: THE HONORABLE A. HOWARD MATZ, U.S. DISTRICT JUDGE

M. Borgarding	Lynne Smith
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
Maury Mills, Jr.
Shannon Casey

ATTORNEYS PRESENT FOR DEFENDANTS
Kimberly Talley

PROCEEDING: MOTION OF MAURY MILLS TO BE RELIEVED AS COUNSEL OF RECORD

Court holds in-chambers hearing regarding counsel for plaintiff's motion to be relieved, and further orders the transcript of the in-chambers hearing under seal.

Court grants motion to be relieved. Shannon Casey is in pro per. Her address is 1734 W. 68th St., Los Angeles, CA 90047; phone number 323 753-0015.

Court orders Plaintiff's Opposition to Counsel's Motion to be Relieved as Counsel of Record and Plaintiff's Request of Consideration to Counsel's Motion to be Dismissed; filed 5-14-01, to be placed under seal.

Court extended all pretrial dates extended 28 days. See attached Amended Schedule of Pretrial Dates.

Court orders defendant to file their summary judgment motion by the motion cutoff date.

APPENDIX G

SHANNON CASEY
1734 West 68th Street
Los Angeles, California 90047
(323) 753-0015

Defendant in Pro Per

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 00-06960AHM(RZX)

[Filed May 14, 2001]

SHANNON CASEY,
Plaintiff,

v.

ALBERTSON'S INC.,
a Delaware Corporation,
Does 1 through 10, inclusive,
Defendants.

PLAINTIFF'S REQUEST OF CONSIDERATION TO COUNSEL'S MOTION TO BE DISMISSED; OPPOSITION TO REASON FOR WITHDRAWAL; DECLARATION OF SHANNON CASEY IN SUPPORT THEREOF.

DATE: May 14th, 2001
CTRM: 14
TIME: 10:00 a.m.

Discovery Cutoff: May 28th, 2001
Motion Cutoff: June 18th, 2001
Trial: August 21st 2001

Dear Justice Matz:

This is written in respect to my attorney Maury Mills Jr.'s request to withdraw from representing me in the above referenced case. I would like to submit this opposition to his reason to withdraw for the following facts.

A. Timing - I am at a very critical point in may case and this withdrawal would prove prejudicial and harmful to my case at this time.

B. Inadequate Notice - This late withdrawal in the midst of proceedings, would not allot adequate time, to provide new council opportunity to do all necessary preparation in my case.

This opposition is based upon my Declaration and facts in this letter. I have tried my best to meet the standards of this court to convey this information of facts.

DATED: May 14th 2001

/s/_____
SHANNON CASEY, Plaintiff
In Pro Per

INTRODUCTION

Later that day of the settlement hearing on 4/19/01 Mr. Mills changed his mind and suggested I settle for the proposed offer along with an apology. He said "keep all of the money, I don't want any court or attorney fees." This struck me as odd. I first retained Mr. Mills September 17th 1999. I first spoke and was advised by him in or around November 1998 and again in May and June 1999.

An obvious lack of interest and faith by mr. Mills in my case has been acknowledged. It has become apparent by his actions that the has not put forth his best effort on my behalf. Mr. Mills has not returned any of my phone calls since 4/20/02, only until after I faxed a letter on 4/25/02 he had his legal assistant/secretary return my call. I am especially concerned about the sudden lack of interest in my case these last few months leading up until now, especially this late in proceedings. Such concerns like why, there has been NO discovery done, (on my side to my knowledge) he has yet to depose any key witnesses, and upon my request for such depositions (on 4/20/01), his comments were "I will have to think about that": and get back to me. Which he never did. Related concerns are:

A. Attorney Mills informed me by phone(@ 3 hours later the day of the 2nd settlement hearing) of a confidential letter he received via fax from the defendants attorney Kim Talley on 4/19/01 which he said a copy was given to the judge "(Judge Dean D. Pregerson) the day of the settlement hearing, which I understand prompted his concern. Mr. Mills read some of it's contents to me. I asked for a copy.

B. Mr. Mills stated he can not give me a copy of such letter stating a promise of confidentiality he made to the defendants attorney(s). So he told me he would call back to discuss the letter in detail. But he never called back, or returned my calls.

C. Is this ethical?

D. Mr. Mills told me told me on 4/19/01 Kim Talley gave him the information hoping to persuade me from going on with the law suite because I am going to lose, & that the defendant would let me still take the offer if I wanted it, because they liked me.

E. Attorney Mills also informed me that his decision to withdraw was due in part to his concerns that the defendant was going to file for a motion of summary judgement ASAP based upon the contents in the letter. The last thing Mr. Mills said was that he would still represent me before hanging up that day 4/19/01.

F. The next morning 7:30 am April 20th 2001 Mr. Mills asked me "Shannon have you thought about it some more?" I said yes. He said "Do you still want to go on with case?" I said yes. Mr. Mills then said "Well then I' going to have to withdraw form the case" I tried to ask him why, he began raising his voice saying NO ! NO ! NO ! Shannon - He wouldn't let me talk. He said "I was on the phone late last night with Kim Talley and she

said "they (defendants) are going to file the motion for summary judgment ASAP and file that this is a frivolous case and I don't' want to be sanctioned, so that is it I can't go on."

G. I found this sudden change of heart insincere, confusing, and unfair, not to mention odd. Mr. Mills did ask me that day, have I thought about filing a workers comp case. I replied "my doctors have asked me that question, but I have not thought about it to much." I guess he asked because I am on disability for severe headaches caused by stress at this time.

/s/_____
SHANNON CASEY, Plaintiff
in Pro Per

DECLARATION OF SHANNON CASEY IN SUPPORT OF CONSIDERATION

I am Shannon Casey

I am the Plaintiff in the above named lawsuit.

While the above are my concerns, if the court must grant Mr. Mills request to withdraw I would like to petition the court to please advice Mr. Mills, due to the strenuous circumstances I am facing to be more prompt in responding to my request, so that this transaction runs smoothly in retrieving all files and other necessary documents immediately, and so that there is no delay in me obtaining suitable council. While this situation has become totally overwhelming and stressful, I have done the best I can to protect my case and to properly bring these concerns to the courts attention. Your honor I would appreciate the courts discretion in review of my concerns if possible.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 14th day of May 2001 in Los Angeles California 90047.

/s/_____

SHANNON CASEY, Declarant

CONCLUSION

Justice Matz I understand that the court room is a public place and my concern is that if the defendants where to be present, some confidential information could be discussed that I rather the defendants not hear. Your Honor I would like to ask that this be a private hearing between Mr. Mills and my self. I would lie all imminent dates pertaining to this case postponed, including my deposition wich is May 16th 2001 at the defendants office. I would also like from mr. Mills my file, a status report, and brief overview of work already done in my case, and a itemized list and proof of expenses incurred by Mr. Mills. I paid a retainer fee of $3000. (Mr. Mills informed Judge Pregerson April 19th 2001 that he has spent less than $800.00 in court and attorney's fees.) Thank you Justice Matz.

DATED: **May 14th 2001**

Respectfully Submitted,

By: /s/_____
Shannon Casey, Plaintiff
in Pro Per